SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 649

THOMAS A. McKNIGHT, WILLIAM McKNIGHT, HARRY W. FAHL, JOSEPH J. PETTI, CHARLES H. STEWART, JR., JUDD H. GRANT, H. ROBERT DAWSON, WILLIAM J. TORSO, AND MICKEY ROMANSKY, *Appellants,*

v.

THE BOARD OF PUBLIC EDUCATION, B. H. KIRKPATRICK, J. H. BIALAS, DR. A. L. LEWIN, DR. LAWRENCE E. VAN KIRK, GEORGE E. WALTERS, MRS. WILLIAM C. RIDGE, JUDGE JAMES H. GRAY, MRS. J. K. B. HARE, A. REX FLINN, MRS. F. B. CHALFANT, J. ROY DICKEY, W. H. COSGROVE, G. W. GERWIG, LAURA M. BRAUN, AND HOMER S. BROWN, *Appellees*

MOTION TO DISMISS THE APPEAL

Appellee moves the Honorable Court to dismiss this Appeal and sets forth its reasons, as follows:

1. The Act of Assembly of Pennsylvania of May 18, 1917, Pennsylvania Pamphlet Laws 309, as amended by the Acts of May 20, 1921, P. L. 958, and March 31, 1927, P. L. 87, known as Pennsylvania School Code (Section 627), provides for a lawful delegation by the Pennsylvania Legisla-

ture to the Board of School Directors of any school district in Pennsylvania of the power to permit use of the school grounds and buildings for certain proper purposes under such rules and regulations as the Board may adopt and, as enforced by the Appellees, is not repugnant to the First and Fourteenth Amendments to the United States Constitution.

2. The Act as it has been construed and applied by Appellee does not discriminate arbitrarily against Appellants and in favor of others in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

In support of the foregoing, Appellee asserts:

Pursuant to the aforesaid provision of the Pennsylvania School Code, as amended, Appellee adopted a Board Rule as to use of school property, designated as Section 416 of the Rules of the Board of Public Education of Pittsburgh, which Rule is as follows:

> "Permits shall not be granted to anyone for any religious or sectarian purpose."

This Rule applies to anyone and everyone where religious or sectarian purposes are involved. The Pennsylvania Legislature said that the Board of School Directors of any district *may* permit the use of school grounds and buildings for certain proper purposes *under such rules and regulations as the Board may adopt,* and this Appellee did. (Emphasis ours). Whether the school property shall be used by any group at all is a matter resting within the discretion of each Board of School Directors. In the absence of any proof of unreasonableness or an arbitrary or capricious exercise of the power, the judgment of the Board must stand. Judicial review of the action of a Board must be restricted to the reasonableness thereof, and it cannot en-

compass consideration of the wisdom of the action taken. Appellee did not act arbitrarily, capriciously and with gross abuse of discretion in denying the application of Appellants. *Regan et al.* v. *Stoddard,* 361 Pa. 469; *Sunbury School District,* 335 Pa. 6; *Wilson* v. *School District of Philadelphia,* 328 Pa. 225; *Hibbs* v. *Arensberg,* 276 Pa. 24; *Lamb* v. *Redding,* 234 Pa. 481; *Ristine* v. *School District of Philadelphia,* 26 D. & C. 655 (cited by Appellants); *O'Connor* v. *Hendrick,* 184 N. Y. 421.

Article 10 of the Constitution of Pennsylvania provides for the establishment and maintenance of a public school system within the Commonwealth, and Section 2 thereof provides:

> "No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

This prohibition against the use of public funds for sectarian religious purposes also appears in Article 3, Section 18, which must be read in connection with said Article 10. Said Article 3, Section 18, provides:

> "No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational or benevolent purposes, to any person or community nor to any denominational or sectarian institution, corporation or association."

The use of a school auditorium for religious instruction or religious services is illegal and unlawful under the laws of the Commonwealth of Pennsylvania, and the decisions of the Courts of Pennsylvania. Said Article 3, Section 18 of the Pennsylvania Constitution denies to Appellants the right to use a school auditorium because such use is an appropriation for the support of a place of worship or a denomination. It is the contention of the Appellee that under the decision of your Honorable Court in the case of

People of State of Illinois ex rel McCollum v. *Board of Education of School District No. 71, Champaign County, Illinois, et al,* decided on March 8, 1948, 333 U.S. 203, 68 Supreme Ct. 461, public school buildings may not be used for religious instruction or religious services by anyone or groups of individuals, including public school pupils, when the schools are not in session.

In the *Everson* case, 330 U.S. 1, your Honorable Court said:

> "Neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. * * * No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa."

Article 1, Section 3 of the Constitution of Pennsylvania provides:

> "All men having natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; * * * and no preference shall ever be given by law to any religious establishments or modes of worship."

In the face of such language, how can anyone say that the Rule as laid down by the Appellee in this case is arbitrary? If Appellee, itself, cannot use school property for religious purposes, how can it permit others to use school property for such purposes? Appellee asserts that a taxpayer could probably enjoin it from permitting Appellants to use of the auditorium, if it granted them a permit.

Considering the foregoing, the Appellants have not been deprived of their civil rights under the Rule. It is perhaps laboring the obvious and oft repeated—to state that the

constitutional guarantee of freedom of speech is not an absolute right to be indiscriminately exercised under all circumstances and conditions.

It must be emphasized that Appellants did not attack the legality, the lawfulness or the reasonableness of the Rule of Appellee. Appellants did not deny the existence of the discretion in the use of the power of Appellee. Appellants contended that permission must be given to all or no one, and that exercise of the power cannot be partial but must be complete. The Statute does not support such reasoning.

Most, if not all, of the cases cited by Appellants are not analogous and are not in point. In no one of them, did a question arise such as in this case. Here, Appellants would have your Honorable Court say that the First and Fourteenth Amendments to the Federal Constitution were violated because Appellee followed and enforced the provisions of the Federal and Pennsylvania State Constitutions and followed and applied the decisions, both Federal and State. For example, the case of *Hague* v. *C.I.O.*, 307 U.S. 496, cited by Appellants, was referred to in the case of *Commonwealth* v. *Hessler* (Jehovah's Witness case), 15 A. 2d 486, by President Judge Keller of the Superior Court of Pennsylvania. He affirmed on the Opinion of the Lower Court, who said:

> "Even the Hague case enunciates the well established principle that the privilege of a citizen of the United States to use streets and parks is not absolute but relative and must be exercised in subordination to the general comfort and convenience and consonant with peace and good order."

In the case at bar, we have a school building and not streets or parks; no arbitrary action such as in the Hague case, but a reasonable rule and regulation adopted pursuant to legislative authority, properly enforced and carried out as

to religious uses in compliance with the provisions of the Federal and Pennsylvania Constitutions and the Federal and State decisions.

The recent decision of *Niemotko* v. *Maryland*, 71 Supreme Ct. 325, has been cited by Appellants. This case is readily distinguishable from the case at bar. In that case a public park was involved, and there was no ordinance prohibiting or regulating use of the park without a permit. The Opinion of your Honorable Court was written by Chief Justice Vinson, who said, inter alia:

> "In this Court, it is argued that State and City officials should have the power to exclude religious groups, as such, from the use of public parks. But that is not this case. For whatever force this contention could possibly have is lost in the light of the testimony of the Mayor at the trial that within his memory permits had always been issued for religious organizations and Sunday School picnics."

In his concurring opinion, Justice Frankfurter said, inter alia:

> "The City allowed other religious groups to use the park. To allow expressions of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment."

In the case at bar, Appellants cannot say that permits under said Rule 416 were granted to anyone for any religious or sectarian purpose and denied to them.

Respectfully submitted,

J. Roy Dickie;
Mortimer B. Lesher,
Solicitor, School District of the City of Pittsburgh, Pa., Appellee.

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